Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *Petitioner,*

v.

RONALD DALE DUNN *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Where a barn is located in a clearing surrounded by woods on a 198-acre ranch circled by a perimeter fence; ranch house and buildings are located at the end of a private drive approximately one-half mile from public road; entrance to private road secured by locked chain; barn was not visible from the public road or perimeter fence; contents of barn could not be seen from air or ground unless barn approached by one penetrating encircling fence, walked under its overhang, stood next to fishnet front covering; and entry could be made only by force or hurdling wooden gates which were locked; is this intrusion by officers a violation of the rights guaranteed by the Fourth Amendment?

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OPINIONS BELOW

The original opinion of the court of appeals, dated May 7, 1982 (Pet. App. 16a-35a), is reported at 674 F.2d 1093. The opinion of this court of appeals on remand from this Court, dated July 16, 1985 (Pet. App. 1a-11a), is reported at 766 F.2d 880. The opinions dissenting from denial of rehearing en banc of the 1985 opinion (Pet. App. 39a-47a) are unreported. The order of January 17, 1986, vacating the 1985 opinion (Pet. App. 48a) is unreported. The opinion of February 4, 1986, reinstating the 1982 opinion of the court of appeals (Pet. App. 49a-51a), is reported at 782 F.2d 1226.

JURISDICTION

The judgment of the court of appeals on remand from this Court (Pet. App. 52a) was entered on September 26, 1985. The petition for a writ of certiorari was filed on December 10, 1985. The new judgment of the court of appeals following the order vacating the 1985 opinion (Pet. App. 52a) was entered on February 4, 1986, and the supplement to petition for a writ of certiorari was filed on April 7, 1986. The petition for a writ of certiorari was granted on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

THE FIRST INTRUSION—NOVEMBER 5, 1980

On November 5, 1980, agents of the Drug Enforcement Administration with officers of the City of Houston, Texas Narcotics Division, were following a vehicle carrying a container of phenylacetic acid in which a "beeper" had been placed. R-IV 23, 31-35, 71. This vehicle was followed by these officers to a ranch site outside of Johnson City, Texas in Blanco County, Texas.

Around 10 o'clock or so in the evening of September 5, 1980, Special Agent Gaspodarik of D.E.A. and Officer Martin Fite of the City of Houston Police Department trespassed upon the ranch owned by Ronald Dale Dunn and conducted a visual and systematic search of the barn, garage, house and carport areas of the ranch. R-IV 80-82.

Having completed their unauthorized search of the ranch buildings and observation of their contents they crossed to the garage, the barns and the carport. They attempted to open the garage, but it was locked. R-IV 83.

Not discouraged, the policeman and the D.E.A. agent continued their trespass by walking around the side of the house. There an officer claimed he detected a "strong odor" of what he believed to be phenylacetic acid emanating from the barn. R-IV 76. They made no effort to obtain a warrant on November 5, 1980.

THE SECOND INTRUSTION—NOVEMBER 6, 1980

Convinced by the knowledge gained from their intrustion upon the ranch on November 5, 1980, that further trespass would be possible, the officers again intruded upon Mr. Dunn's ranch in the early afternoon. R-IV 85. Their route of trespass was basically the same route as that taken on November 5, 1980. This time D.E.A. Agent Fred Thomas accompanied Agent Gaspodarek who led Agent Thomas directly to the barn to view in daylight what he had seen by flashlight. R-IV 89. Again no warrant was sought or obtained. R-IV 116.

THE THIRD INTRUSION

THE EVENING OF NOVEMBER 6, 1980

Still not satisfied by their unauthorized intrusion on the two previous occasions, the agents and officers again tres-

passed on the evening of November 6, 1980, at about 7 p.m. Brazenly they went right up the driveway to see if any cars were in the carport. R-IV 91. The agent said he was anywhere from 100 to 50 yards to the home. R-IV 92. This trespass was committed by three other agents of D.E.A. along with Agent Gaspodarek. R-IV 103. They again searched and continued their vigil of Mr. Dunn's ranch on his ranch.

THE FOURTH INTRUSION—NOVEMBER 7, 1980

Not satisfied with what they had seen, the Agents enlisted the aid of the D.E.A. chemist to verify their observations. So, on the night of the 7th of November, 1980, Officer Fite and D.E.A. Chemist Goldston violated the privacy of Mr. Dunn's ranch and trespassed to the "laboratory." R-IV 151-152. Officer Fite did not know if a warrant was in existence or not.

SUMMARY OF THE ARGUMENT

Without a barn there is no farm. A barn is an integral part of a farm home. It houses animals, machinery, tools, and supplies for the farm.

Without question, the barn is closely associated with the home and the activities of family life. The barn in this case is within the general fence which is the fence guarding the expectation of privacy of the landowner and is within the curtilage of the home.

The Fourth Amendment values expressed in this Court's decisions reveal that curtilage is a vibrant concept, never stagnant, always adapting to the situations of land ownership today and tomorrow.

The location of house, barn and interior fences on a Texas farm demonstrate curtilage applies to the buildings

within that enclave. The Fourth Amendment therefore protects the home, the individuals' rights to be free from physical trespass and search of the barn.

RIGHT OF PRIVACY

The barn is an integral part of the farm. There is a right of privacy in the barn just as there would be in any commercial building. This right of privacy is the very essence of constitutional liberty and is as important as any other constitutional guarantee to any citizen. The location of the barn in an area not subject to public view or public access in a fenced area of 198 acres with a locked entrance call for the protection of the Fourth Amendment.

POLICY

The physical trespasses on the respondent's land and the unlawful search of his barn on three occasions were each violations of Texas state aw which provides penalties for trespassers and by statute gives a right of privacy. Texas state law also gives a right to use force to protect property from trespass. This creates a volatile situation in a state where folks are very protective of their property rights, and where they possess firearms and are subject to using them.

Violations of these state laws could lead to tragic results. This Court should recognize Texas laws, give full faith and credit to them, and insist that federal officers abide by state laws in this area.

Affirmation of this case on a ground of Comity would result in maintaining and furthering respect for the law.

ARGUMENT

Respondent's Barn Was Within The "Curtilage" Surrounding His Home

A farm is not a farm without a barn. A barn is an integral part of a farm home. Hay or feed, animals, machines, as well as other equipment, are kept in barns. The barn is always built some distance from the farm home for various reasons, including small varmints, flammable materials, and odors. The barn in this case was immediately surrounding and associated with the home.

The site plat attached to the Fifth Circuit opinion of February 4, 1986, (App. I) shows explicitly the fact that the path from the house to the barn and the driveway to the barn were both well-worn and used. The driveway leading from the road to the carport, one-half mile distant from the public road, continued to the barn at the rear of the house. The entire 198-acre tract was under a wire fence, which was the common fence referred to by Blackstone in his commentaries. The use of wire in Texas began in the 1880's. It's use changed the look of farm houses. Fences were put around the house to allow the housewife to have a yard filled with flowers protected from foraging cattle and horses. Other fences protected vegetable crops from these same animals. The fence at the public road was the fence keeping the public out of the farm. The fence around the house was there to protect the yard and garden from farm animals, and not to keep the public out, as the general fence served that function. As in *Walker* v. *United States*, 225 F.2d 447 (Fifth Circuit, 1955):

> Barn was part of owner's curtilage, and was within protection against unreasonable searches and seizures, though it was 70 to 80 yards from house and separated from house by private driveway and was

> surrounded by fence in which was a gap allowing entrance into barnyard from driveway in front of house.

The gate at the entrance to the Dunn property was secured by a locked chain. With that description of the usual farm in Texas, Appellee Dunn states the barn in this case was within and a part of the curtilage of the house.

> . . . curtilage is 'an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling.' *United States* v. *LaBerge*, 267 F. Supp. 686 (Md 1967).

Certainly the concept of curtilage must be an expanding one from its beginning with rock fences to the wire fences of today. It cannot remain stagnant as though the fences in Texas today are exactly like the fences of England in Blackstone's time.

Therefore, with the barn within the curtilage of the Dunn house, the agents of the government physically trespassed on Appellee Dunn's property in order to *seek* probable cause (App 33), and violated Appellee Dunn's Fourth Amendment rights by physically intruding without justification. These agents of the government had aerial photographs of Dunn's property in their possession early in the afternoon on November 5, 1980. They had ample time during daylight hours to study every detail in the photographs relating to the Dunn property. Yet, they chose to wait for the cover of darkness and proceed like thieves in the night to accomplish a mission supposedly designed to enforce the laws.

Their nighttime trek took them through the general fence surrounding Dunn's property where they physically trespassed upon the curtilage by walking under the tin overhang of the pole barn. With the aid of their flashlights

they looked through the barn's opening and inventoried the contents. Apparently not satisfied with their first trespass upon Dunn's property, government agents committed two additional physical trespasses, one in broad daylight.

Each time these agents entered Dunn's property they penetrated the curtilage and violated Dunn's Fourth Amendment right to be free from these unlawful trespasses and illegal searches.

By no means did any of these agents have the right to be in Dunn's barn under the overhang. This barn was behind the house and no member of the public had access to any part of these buildings save by invitation. None of the agents, government and state had any such invitation.

To say this barn was not a part of the curtilage is to give agents license to trespass upon private property and will lead to the oppressive practices condemned by James Otis in Paxton's Case, 1761, when the British government allowed general searches of the colonists by warrants called Writs of Assistance.

A holding by this Court in favor of the government would in effect be the issuance of the same type warrant which lead to the adoption of the Fourth Amendment.

The dissenting words of Judge Brandeis in *Olmstead* v. *United States*, 277 U.S. 478, 48 S.Ct. 572, 72 L.Ed.2d 954, (1928), are very appropriate to this case in placing Dunn's property within the context of the Fourth Amendment:

> They conferred as against the Government the right to be left alone—the most comprehensive of rights and the right most valued by civilized men. To protect the right, every unjustifiable intrusion by the Government upon the privacy of the individual,

whatever the means employed must be deemed a violation of the Fourth Amendment.

The government seeks to have this Court limit the curtilage to the nearest fence. It gives no reason or explanation for so doing. Then in its whipsawing action the government wants this Court to reject the curtilage concept if there is but one fence around the property and the area is large (the government's subjective description.) As the Court knows, what seems large in another state is but a normal distance in Texas.

Society expects its landowners to be protected in their ownership of property, not only from criminals, but from the police.

Without question the barn in this case was a part of the curtilage, and the warrantless entries on November 5th. and 6th., 1980, constituted Fourth Amendment violations. The government sought probable cause for a search warrant by trespassing on three occasions. It cannot say it had probable cause to search because the agent in charge admitted his intent in going on the Dunn property was to *seek* probable cause. (App. 33.)

The government fails to note that the agents searched the carport, the garage and the storage areas outside the fence surrounding the house, but conntected to the fence around the house. Even the government would not urge that the garage, carport and storage areas were not within the curtilage.

This case should be affirmed on the violations of Dunn's Fourth Amendment rights.

RIGHT OF PRIVACY

Assuming the Court finds the barn is not a part of the curtilage, the next consideration is its status. Dunn

exhibited a subjective expectation of privacy in the barn and its contents. The steps he took were open and obviously designed to tell the public his land was not open to it. The farm was surrounded by a general fence, and the private driveway was secured by a locked chain.

The barn, as an essential part of Dunn's business, enjoyed the same Fourth Amendment protection as do other businesses. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), and *Oliver* v. *United States*, U.S. 80 L.Ed.2d 214.

Dunn had property rights by virtue of his ownership of the land where the barn was located. As this Court stated in *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 389 (1978).

> . . . property rights reflect society's explicity recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectation of privacy are reasonable. 439 U.S. at 153, 99 S.Ct. at 435 (Powell, J. Concurring).

". . . an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." U.S. 80 L.Ed.2d at 224 104 S.Ct. Dunn had a right to privacy in the barn guaranteed to him by the Fourth Amendment. Neither *Oliver, supra*, nor *California* v. *Ciraolo*, 476 U.S. 90 L.Ed.2d 210, 106 S.Ct. include an open field to include a structure such as the barn in this case.

The definition of open fields in *Oliver, supra*, includes any unoccupied or undeveloped area which could also encompass a thickly wooded area. That is not involved in this case. We have a culturally distinct unit accepted by society as one deserving Fourth Amendment protection.

Is Mr. Dunn or any other farmer to stand idly by while agents of the government search his barn without a warrant issued by a magistrate?

The actions of the agents of the government violated the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are intrinsically unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.'" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576, 1971. There are no exceptions in this case.

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POLICY

Under Texas law a landowner who has taken the steps Dunn took is given a right of privacy by statute. § 30.05 Criminal Trespass, Penal Code of Texas:

> (a) person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.
>
> (b) For purposes of this section:
>
> (1) "entry" means the intrustion of the entire body; and (2) "notice" means:
>
> (A) oral or written communication by the owner or someone with apparent authority to act for the owner;
>
> (B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or
>
> (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.
>
> (c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about his person during the commission of the offense, in which event it is a Class A misdemeanor.

Texas law further authorizes one in possession of land to protect his property by the use of force. § 9.41, Penal Code of Texas:

> (a) A person in lawful possession of land or tangible, moveable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

Under the facts of this case had Dunn been home when the agents searched his barn at night, Texas law gave Dunn the right to use force to protect his property from trespassers. Had this occurred there is no doubt Dunn would have been charged in federal court with assaulting a federal officer under 18 U.S.C. 1101.

Dunn submits that in the interest of Comity, this Court recognize that federal agents or any law enforcement agency obey the laws of the state in a situation such as this. By affirming this case on policy grounds of Comity this Court would affirm the basic principle of law that everyone is supposed to obey the law, and no person is above the law. This would require the agents of the government to know and obey the laws of the state as well as federal law.

In this case there can be no argument for lack of knowledge, for one of the officers involved in the initial trespass was an officer for the City of Houston, Texas. This officer is required to know and enforce the laws of Texas.

In *Oliver, supra*, the Court in note 15 speaks about trespass under the common law and says it is not to be applied to public officers. Under Texas statutes quoted above, there is no exception for public officers.

All who violate the mandate of Sec. 30.05 are guilty of criminal trespas. In the case of *United States* v. *Hylton*, 710 F.2d 1106, 1109 (Fifth Circuit, 1983) the Court concluded there was a violation of Texas criminal statute by I.R.S. agents.

A policy set forth by this Court directing law enforcement agencies of the government to obey the laws of the state where the land is located can only preserve the constitutional rights of all persons.

> A rule preventing the government from exploiting its own wrongdoing is intended to serve the policy of maintaining respect for law. The primary way in which such a rule furthers this policy is by deterring government officials from illegal acts. 'Our Government is the potent, the omnipresent teacher . . . If the Government becomes a lawbreaker, it breeds contempt for law . . .' *Olmstead* v. *United States*, 277 U.S. 485 (1928) (Brandeis, J., dissenting.)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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